In the High Court of Judicature at Madras

Dated : 12.9.2017

Coram :

The Honourable Mr.Justice T.S.SIVAGNANAM

Writ Petition Nos.24425 to 24429 of 2017
& WMP.Nos.25813 to 25817 of 2017

M/s.Industrial Minerals Refractories,
rep.by Prasad Shashikant Shah,
Partner, 10-2, bangalore by-pass road,
sakthi murugan complex,
2nd floor, salem-5. ...Petitioner in all wp's

Vs

The Assistant Commissioner (CT),
Suramangalam Assessment Circle,
Salem. ...Respondent in all wp's

PETITIONS under Article 226 of The Constitution of India praying for the issuance of Writs of Certiorari to call for the records of the files of the respondent in TIN : 33521804248/2011-2012, 33521804248/2012-13, 33521804248/2013-14, 33521804248/2014-15 and 33521804248/2015-16, all dated 30.6.2017, received on 13.7.2017 and quash the same as being violative of principles of natural justice and without jurisdiction and hence, invalid and illegal.

For Petitioner : Mr.V.Srikanth

For Respondent : Mr.K.Venkatesh, GA

COMMON ORDER

Mr.K.Venkatesh, learned Government Advocate accepts notice for the respondent. Heard both. By consent, the writ petitions are taken up for joint disposal.

2. The petitioner is a registered dealer on the file of the respondent under the provisions of the Tamil Nadu Value Added

Tax Act, 2006 and the Central Sales Tax Act, 1956. In these writ petitions, the petitioner has challenged the assessment orders for the years 2011-12 to 2015-16.

3. The show cause notices issued for all the above assessment years are identical pointing out certain defects, which are classified under two heads namely that the petitioner is entitled for adjustment of the input tax credit as done by them in the impugned assessment orders. The second issue is with regard to the claim made by the petitioner for refund of input tax credit, which they reversed by placing reliance upon the decision of this Court in the case of Everest Industries Limited Vs. State of Tamil Nadu [reported in (2017) 100 VST 158].

4. On a perusal of the impugned orders, it is eventually clear that the Assessing Officer did not give any reasons as to why the case as projected by the petitioner in their reply dated 25.2.2017 to the revision notices dated 20.2.2017 is not acceptable. In fact, the Assessing Officer rejected the objections of the petitioner in a single line stating that the reply given by the petitioner cannot be considered as per Section 18(3) of the State Act. As noticed above, the impugned orders being devoid of reasons, it is sufficient to set aside the same.

5. The petitioner's specific case is that they have been making the claim in Form No.1 within the period prescribed under Section 19(11) of the State Act and hence, the respondent was not justified in issuing the show cause notices proposing to reverse the input tax credit on the ground that the claim was not made within 180 days as per Section 18 of the State Act.

6. The petitioner has also placed reliance on the decisions of this Court in the case of R.K.Knits Vs. AC (CT), Adyar II Assessment Circle [reported in (2015) 84 VST 521] and in the case of Xomox Sanmar Limited Vs. AC (CT), Mylapore Assessment Circle, Chennai [reported in (2016) 94 VST 409].

7. In the case of R.K.Knits, somewhat a similar dispute was raised as in the instant case and this Court considered the issue as to whether the Assessing Officer was justified in rejecting Form W filed beyond 180 days. While answering the question, it was held as under :

> "In the face of the admitted fact as to the filing of form I remaining undisputed, I do not find any justification in the contention of the respondents herein that form W filed beyond 180 days resulted in the rejection of the refund claim. In the light of the fact that the provisions on input-tax

credit is a beneficial provision under the Act and that the provisions of the Act also contemplate filing of monthly returns and that a claim could be made therein too by giving necessary details along with the input-tax credit refund claim, the proper course herein for the first respondent would be to take up the assessment expeditiously to consider the claim and pass orders accordingly."

8. In Xomox Sanmar Limited, the very same question was considered by this Court and this Court, after taking note of the decision of the Andhra Pradesh High Court in the case of Maxworth Plywoods Private Limited Vs. AC (CT) (Audit), VAT Management Unit II [reported in (2013) 62 VST 573], allowed the writ petition and remanded the matter to the Assessing Officer to redo the assessment with regard to preference of set off by holding that the finding rendered by the Assessing Officer referring to Section 18(3) of the State Act was erroneous. At this juncture, it will be useful to refer the relevant portions, which read as under :

"9. After elaborately hearing the learned counsel for the parties and perusing the materials available on record, the undisputed position is that Section 18 of the TNVAT Act does not prescribe the method of preference of set-off of ITC. Therefore, in the absence of any statutory provision with regard to method of preference, it has to be seen as to whether the procedure adopted by the petitioner is just and proper and subserves the object behind the Act or whether the action of the respondent is justified. At this juncture, it would be beneficial to refer to the decision of the Maxworth Plywoods P. Ltd. Vs. Asst. Commr. reported in (2013) 62 VST 573 (AP). In the said case, the petitioner claimed Input Tax Credit, relatable to the Assessment years 2005-06 and 2006-07 and, as in the instant case, adjusted Input-Tax Credit against Output payable on its trading activity, and the remaining Input-Tax Credit against the output tax payable by its manufacturing unit. The petitioner's (therein) case was that adopting any other method would result in they not being able to avail of the tax deferment benefits, as the period stipulated for tax deferment came to an end by March,

2007. However, the Assessing Officer issued a notice proposing that Input-Tax Credit should be adjusted first against the output tax payable by the petitioner's (therein) manufacturing unit, and the balance alone should be utilized for adjustment against the output tax payable on their trading activity. The petitioner raised their objections to the said proposal and ultimately, the Assessing Officer did not accept the objections raised by the petitioner and confirmed the proposal. This was put to challenge before the Andhra Pradesh High Court and the Court after considering the submissions, held as follows:-

" 6. .... the first respondent admits that there is no specific rule providing for the manner in which he had assessed the petitioner to tax. Under Article 265 of the Constitution of India no tax can be levied or collected except by authority of law and in the absence of a procedure, similar to the one adopted by him, being prescribed by law it is not open to the assessing authority to contend that a particular mode should be adopted, or that the procedure adopted by the assessee is not rational. It is the petitioner's case that the method of adjustment of input tax against the output tax payable, adopted by them would enable them to avail of the benefit of the balance tax deferment in its entirety which they would otherwise not be in a position to utilize as the period of availment of tax deferment expired by March, 2007. The assessing authority cannot insist on the assessee adopting a particular method which would deny them the benefit of utilization of the balance available tax deferment in its entirety, and instead pay tax. The impugned order of assessment, to the extent the assessing authority adjusted the input tax credit first against the manufacturing activity of the petitioner and the balance against their trading activity, is neither a method authorized by law nor can such a method be forced on the assessee as it is to their detriment. The assessment order must, to this limited extent, be set-aside."

10. On a reading of the above judgment, it shows that the Court considered the issue and found that when there is no specific Rule providing the manner in which the petitioner had to be assessed to tax, which is not open to the Assessing Authority to contend that the particular mode should be adopted or that the procedure adopted by the assessee is not rational and that the Assessing Authority cannot insist on the assessee adopting a particular method which would deny them the benefit of utilization of the balance available tax deferment in its entirety, and instead of paying tax.

11. In my view, the above decision of Andhra Pradesh High Court over which I am in respectful agreement would squarely apply to the facts of the present case and unless and until the respondent is able to clearly demonstrate that the procedure adopted by the petitioner is contrary to the Statute, then the question would be as to why the petitioner should not be permitted to adopt the preference of Set-off as done by them in the Returns for the relevant assessment years. Even in the contentions raised by the respondent as set out above, the respondent does not dispute the fact that under Section 18 of the TNVAT Act, no procedure has been prescribed with regard to the method of preference of Set-off of ITC.

.....

13. With regard to preference of Set-off, the findings rendered by the Assessing Officer is set-aside and the matter is remanded to the Assessing Officer to redo the assessments on the said head, after issuing notice to the petitioner and after affording an opportunity of personal hearing and in the light of the directions issued in the preceding paragraphs."

9. As noticed above, the petitioner referred to two decisions in their objections dated 25.2.2017. Unfortunately, the Assessing Officer did not even make an endeavour to go through the judgments and understand as to what is the legal

position, which has been laid down in those decisions. It is clear that the Assessing Officer abdicated his statutory powers and the assessments have been completed in a most cryptic manner. For all the above reasons, the finding rendered by the Assessing Officer with regard to adjustment of input tax credit is set aside.

10. So far as the next issue is concerned regarding the petitioner's claim for the refund of input tax credit, which has been reversed by them for the relevant assessment years, the petitioner did not specifically raise a plea that the refund should be granted to them in the light of the decisions of this Court in Everest Industries Limited. In any event, this Court is inclined to set aside the impugned proceedings with regard to the adjustment of input tax credit and for the reasons stated above, this Court is also inclined to give liberty to the petitioner to make a claim for refund with regard to reversal, which they effected by placing reliance upon the decision of this Court in the case of Everest Industries Limited.

11. The learned Government Advocate points out that the State has preferred an appeal against the decision in Everest Industries Limited.

12. However, it is admitted that the appeal is yet to be numbered and it is still in the SR stage.

13. The settled legal position is that mere pendency of an appeal would not amount to stay of a judgment or order. In the instant case, the appeal is yet to be numbered. Therefore, as on date, the decision in Everest Industries Limited holds the field.

14. For all the above reasons, the writ petitions are partly allowed and the impugned assessment orders are set aside in so far as the rejection of the petitioner's objections with regard to adjustment of input tax credit and the matter is remitted back to the respondent to redo the assessment under the said head by taking note of the decision in the cases of R.K.Knits and Xomox Sanmar Limited referred supra. The petitioner is given liberty to seek for refund of the input tax credit reversed by them in the light of the decision in the case of Everest Industries Limited. In this regard, the petitioner shall give specific reasons in writing to the Assessing Officer. The Assessing Officer, while redoing the assessment with regard to adjustment of input tax credit, shall also consider the petitioner's representation in the light of the decision in Everest Industries Limited and pass appropriate orders on merits and in accordance with law. The above direction shall be complied with by the Assessing Officer within a period of three

months from the date of receipt of a copy of this order. No costs. Consequently, the above WMPs are closed.

Sd/
Assistant Registrar

/True copy/

Sub Assistant Registrar

To
The Assistant Commissioner (CT),
Suramangalam Assessment Circle, Salem.

+1cc to Special Government Pleader(Taxes)SR.No.66348

+1cc to Mr.C.Venkataraman, Advocate SR.No.65896

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SDR 09.10.2017